

EXHIBIT 5

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO

SARA HAWES, individually, and on behalf of
all others similarly situated,

Plaintiff,

v.

MACY'S WEST STORES, INC.,

Defendant.

Case No. 1:17-cv-00754

Judge Timothy S. Black

DECLARATION OF LAWRENCE E. QUEEN

I, Lawrence E. Queen, declare and state as follows:

1. I am over the age of 18 and under no disability. I have personal knowledge of the matters set forth herein, unless otherwise specifically indicated.

2. I am the founder of AQ Textiles, LLC ("AQ"). I am also a member and manager of AQ.

3. AQ Textiles is an importer and supplier of textile products, primarily bedsheets. AQ Textiles purchases bedsheets from mills overseas (primarily in India) and sells them to retailers in the United States.

4. Among other products, AQ Textiles imports and supplies a variety of CVC sheets. "CVC" refers to "chief value cotton," which means that the sheets are made of a combination of cotton and another material (usually polyester), with more than 50% of the material being cotton.

5. In approximately 2009, there was a technological innovation that allowed CVC sheets to be manufactured in a different way. Specifically, a process was developed whereby a number of very fine polyester weft yarns could be simultaneously inserted and woven into cotton

warp yarns. This allowed for the manufacture of high-thread-count CVC sheets that were softer and more durable than previous CVC products.

6. AQ Textiles has been purchasing CVC sheets manufactured using multi-pick insertions from Creative, for sale to American retailers, since approximately 2010. AQ Textiles also purchases CVC sheets from other suppliers.

7. When purchasing CVC sheets from Creative, AQ transmits a purchase order to Creative. That purchase order includes the specifications for the sheets: including the size of the sheet, materials used in weaving it, and the thread count of the sheets based on the number of ends (warp yarns) and picks (weft yarns). Examples of purchase orders transmitted to Creative, for sheets that were ultimately sold by AQ to Macy's, are attached as exhibits as listed below. Creative does not have any direct contact with Macy's.

8. For example, on the purchase order attached as Exhibit A for AQ Order 1582 for Grayson sheets, "60 cotton singles" refers to the type of cotton warp yarn to be used. "15D polyester" indicates that the weft yarns should be 15-denier polyester yarns. "165 x 63 (12 pick)" refers to the construction of the sheets: each square inch of fabric will be composed of 165 cotton warp yarns and 63 weft insertions, with each insertion containing 12 polyester weft yarns (also referred to as "picks"). That would result in 165 cotton warp yarns and 756 polyester weft yarns being used to weave the sheets, for a total thread count of 921. The purchase orders also direct that AQ Textiles requires confirmation of thread count from an independent international third party laboratory for each shipment. The test report for AQ Order 1582 is also included in Exhibit A.

9. The specifications for the sheets can vary widely. For example, the sheets AQ Textiles has purchased from Creative for sale to Macy's vary with respect to factors such as the

size and color of the sheets; the amount of cotton versus polyester; the type and size of the cotton yarns (for example, the “60 singles” cotton referenced above) and polyester yarns (for example, the 15-denier polyester referenced above); the origin and quality of the cotton (such as using Egyptian cotton or Supima cotton); the construction of the sheets; and whether the sheets have any special traits meant to improve their feel or performance. (The specifications for a line or program of sheets can change between shipments.)

10. Each of those factors can affect the softness, hand feel, durability, strength, and price of the final sheets. For example, using more expensive materials (such as Egyptian or Supima cotton, or a higher ratio of cotton to polyester yarns in general) can make sheets softer, but generally will increase the cost of the final product, regardless of its thread count.

11. The construction of the sheets is of particular importance in the sheets’ individual characteristics. (“Construction” in this context refers to the pattern used in the weaving of the sheets.) Types of sheet construction include percale, sateen, jacquard, twill, and dobby. A percale weave, for example, is a tighter weave that results in a more durable and lightweight fabric; whereas a sateen construction will result in sheets that are softer and more “luxurious” feeling. Dobby and jacquard are less common types of construction that allow for patterns to be woven into the sheets; dobby weave usually features geometric patterns while jacquard designs are more complex.

12. Finally, some sheet sets sold by AQ Textiles have special traits. One such feature, utilized in some of the sheets AQ Textiles has sold to Macy’s, is Celliant® technology. Celliant® technology, which is used in many types of fabric including Under Armour athletic apparel, captures and converts body heat into infrared energy temporarily increasing local circulation and cellular oxygenation. Clinical tests show that Celliant® technology promotes restful sleep,

increases energy and stamina as well as aids in quicker physical recovery. Sheets manufactured using the Celliant® technology highlight some of those benefits in their packaging.

13. Other sheets that have been sold to Macy's have special performance features. The Optimal Performance sheets for example are bleach safe, pill resistant, and have stain release properties to keep the sheets clean. The bleach safe and stain release attributes come from the application of chemicals during the finishing process. These attributes are not offered on other sheets AQ Textiles sells to Macy's.

14. Other special traits that have been added to some sheet sets sold by AQ to Macy's include moisture wicking, deep pockets, extra pillowcases, and wrinkle resistance. These features are generally highlighted on the inserts that are visible to the consumer when purchasing the sheets.

15. AQ Textiles has historically ordered sheets with a wide range of differing characteristics because the retailers to which AQ Textiles sells the sheets, including Macy's, like to have a variety of products at a variety of price points and with a variety of features to choose from (and to offer to their own consumers). The price of the sheets sold by AQ Textiles to Macy's is affected by what attributes are included in the sheets.

16. In 2015, an entity named AAVN, Inc. ("AAVN") had a patent issued to it for the manufacture of multi-pick insertion CVC sheets in a certain range of thread counts. After the patent was issued, AAVN instituted patent infringement lawsuits against AQ Textiles, Creative, and multiple other entities involved in the manufacture and sale of such sheets. AQ Textiles now has a license from AAVN to sell sheets using the methods protected by AAVN's patents.

17. As I testified at my deposition, although AQ Textiles disputed the claim of patent infringement, in reaction to the lawsuit, AQ Textiles began requiring Creative and all of its other

suppliers to provide test reports from accredited international testing laboratories to certify thread count pursuant to ASTM D3775 and specifications for each shipment AQ Textiles purchased.

18. AQ Textiles did not obtain those reports; Creative and the other manufacturers did. AQ Textiles did not communicate with thread-counting testing labs about the test reports obtained by the manufacturers.

19. Since the time that AQ Textiles began requiring thread-count test reports from manufacturers, AQ Textiles has received a thread-count test report from Creative before receiving every shipment of sheets. AQ produced hundreds of those reports in response to subpoenas. If Creative is unable to provide valid thread-count test reports, AQ Textiles will not purchase the sheets. Exhibits B to G are examples of purchase order to Creative for shipments along with the corresponding test reports. Exhibit B is for AQ Order 1539 for Grayson sheets; Exhibit C is for AQ Order 1000 for Celliant sheets; Exhibit D is for AQ Order 1260 for Geneva sheets; Exhibit E is for AQ Order 1419 for Marlow sheets; Exhibit F is for AQ Order 1275 for Mason sheets; and Exhibit G is for AQ Order 1612 for Parker sheets.

20. Since the time that AQ Textiles began requiring thread-count test reports from manufacturers, AQ Textiles has not supplied any sheets to Macy's without first obtaining a thread-count test report.

21. When AQ Textiles first began requiring such reports, testing labs often had trouble counting the very fine polyester yarns in CVC sheets manufactured using multi-pick insertions, because they were unused to the appearance of sheets manufactured using that technology. Specifically, the testing labs did not realize that the fine polyester yarns, while laid in parallel, would need to be individually separated by hand. I do not mean that a single yarn needed to be

separated into its constituent fibers or filaments; I mean that each individual yarn needed to be separated from the other yarns inserted into the same “shed” so that it could be properly counted.

22. My efforts as part of an ASTM Committee to update the D3775 standard—for testing thread count—were meant to eliminate the confusion and inconsistencies among test labs about how to test the thread count of these sheets. I have never believed or understood that counting every thread in CVC sheets made with multi-pick insertions was inconsistent with the ASTM D3775 standard. In fact, I believe the current standard requires each thread to be counted, regardless of whether that thread was part of a multi-pick insertion. The ASTM continues to examine the D3775 standard today.

23. I have never attempted to change or modify the ASTM D3775 standard so that individual fibers within threads are counted; nor have I ever communicated with any testing lab to ask the testing lab to count individual fibers in any test reports.

24. It is important for testing that a laboratory manually separate threads in CVC sheets made with multi-pick insertions so that each yarn would be counted. I believe that is consistent with ASTM 3777D. It also makes good common sense. Each of those separate threads went into the sheets; they should be reflected in the thread count.

25. In the report of Sean Cormier, Mr. Cormier claims that AQ “sent an email to SGS Testing Laboratories on 4/27/2017 telling them that they are doing the test incorrectly.” He then went on to further describe that email, repeatedly claiming that AQ had sent the email and made the statements therein. The email is not attached to Mr. Cormier’s report.

26. To my knowledge, no one at AQ sent an email to SGS Testing Laboratories on April 27, 2017. Instead, I believe Mr. Cormier is referring to the email attached as Exhibit H, which is one of the documents cited in his report among those he reviewed. That document is not

an email from me, or anyone else at AQ, to SGS Testing Laboratories. It is an email from an employee of Globe Cotton, another Indian textile mill to me. None of the statements in that email were made by me, or anyone else at AQ. To my knowledge, I never responded to this email.

27. One of the programs (a group of related UPCs with the same brand name) of CVC sheets sold by AQ Textiles to Macy's was the Somerset program. Somerset sheets were sold to Macy's between July 23, 2015 and May 29, 2017. (Those dates are based on the anticipated arrival date of the sheets in the United States.) There were 67 separate shipments of those sheets from Creative to AQ Textiles during that period. Some were Somerset and some were Somerset Extra Deep. Those sheets were all sold to Macy's but I do not know to which Macy's entity they were ultimately provided. The Somerset sheets provided to Macy's during that time period were sold in sets with four pillowcases. They were available in Queen, King, and California King. Packs of two standard pillowcases and packs of two king sized pillow cases were also sold. They were available in White, Ivory, Dark Grey, Blue, and Green. The construction of the sheets was 60's Single Cotton yarns for the warp; 20D Polyester Yarns for the weft meaning 20 denier polyester yarns. The yarns were to be woven with a sateen method with 184 cotton warp yarns with 69 different insertions, with each insertion containing 10 polyester weft yarns (or picks). That construction is per square inch. Purchase order number AQ 964 and dated February 4, 2015 showing this construction along with a corresponding test report is attached as Exhibit I. Thus, Creative was instructed to construct the Somerset sheets using 874 total threads.

28. When Creative shipped the sheets ordered in AQ 964, it provided a test report from Intertek dated September 23, 2015 which determined that the thread count of the Somerset sheets was 900 per square inch. That test report is included in Exhibit I. The test report also reported that each individual polyester thread was 20.5 denier.

29. Similarly, on December 3, 2015, AQ Textiles provided a purchase order to Creative for Somerset sheet sets. That purchase order (1095A) is attached as Exhibit J. When Creative shipped the sheets ordered in purchase order 1095A, it provided a test report from Texanlab Laboratories in Mumbai, India dated January 7, 2016 showing a thread count of 865 threads with each polyester yarn being 20.2 denier, which is included in Exhibit J. (The documents from India often use the European method of dating showing the day of the month before the month.)

30. On February 28, 2016, AQ Textiles provided a purchase order to Creative for more Somerset sheets. Purchase order 1140, dated February 28, 2016 is attached as Exhibit K. When Creative shipped the sheets, it provided a test report from SGS Laboratories dated April 23, 2016 showing a thread count of 882 threads with each polyester yarn being 20.9 denier. (The SGS report referred to the cotton threads as ends and the polyester threads as picks.) That test report is included in Exhibit K.

31. Beginning in the fall of 2016, Somerset sheets were made with 15 denier threads instead of 20 denier threads. Although the AQ purchase orders do not reflect this change, the specifications received from Macy's do. Purchase order 1255 dated September 19, 2016 was the first purchase order for Somerset made with 15 denier yarns. Exhibit L. That change is reflected on the test report for that order which is dated December 14, 2016. That report provided a thread count of 872 per inch: "Total no. of threads: 872." Attached to Exhibit L.

32. The Somerset sheets were woven with 15 denier polyester threads for the purchase orders dated September 19, 2016 to May 29, 2017 which is the last purchase order for Somerset sheets.

33. On March 2, 2020, AQ Textiles obtained a test report from Consumer Testing Laboratories, Inc. for the 900 thread count Somerset sheets. That test report is attached as Exhibit M. It shows a thread count of 877 which is within the required 5% tolerance for ASTM thread counts.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 30, 2021.


Lawrence E. Queen

EXHIBITS A-M

(UNDER PROVISIONAL SEAL)